IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 13TH DECEMBER 2006 / 22ND AGRAHAYANA 1928

WP(C).No. 22829 of 2005(P)

PETITIONER:

T.V.MOHAMMED FAISAL, AGED 45 YEARS,
S/O.UMMER KUNHI, THANIYAKAYIL HOUSE,
PUNNA, CHAVAKKAD POST, PIN-680 506,
THRISSUR DISTRICT.[TERMINATED AS JFCM-III,
PALAKKAD].

BY ADVS. SRI.P.S.BIJU
SRI.K.ANAND

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY
THE CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE PRINCIPAL SECRETARY TO GOVERNMENT,
HOME DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

3. THE HIGH COURT OF KERALA,
REPRESENTED BY THE REGISTRAR.

BY GOVERNMENT PLEADER SRI.P.N.SANTHOSH - R1 AND R2
SRI.ELVIN PETER P.J.-R3

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/10/2006, THE COURT ON 13.12.2006 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

Ext.P1: True copy of the Memo of charges bearing No. R/KVS/28/93(SS)/II.

Ext.P2: True copy of the reply dated 7.4.1994.

Ext.P3: True copy of the Memo of charges bearing No. R/KVS/29/94(SS)I/I dated 26.10.1994.

Ext.P4: True copy of the reply dated 10.1.1995.

Ext.P5: True copy of the additional written statement dated 24.10.1995.

Ext.P6: True copy of the written statement submitted by the Delinquent Officer after enquiry.

Ext.P7: True copy of the Enquiry report dated 29.01.1996.

Ext.P8: True copy of the Enquiry report dated 29.01.1996.

Ext.P9: True copy of the show cause notice dated 5.8.1996.

Ext.P10: True copy of the reply dated 5.9.1996.

Ext.P11: True copy of the Order G.O.(MS)No:203/97/Home dated 14.8.1997.

Ext.P12: True copy of the Review Petition dated 28.10.1997.

Ext.P13: True copy of the letter No.70731/C3/97/Home dated 13.12.2000.

Ext.P14: True copy of the Order G.O.(MS)No.32/2004/Home dated 27.1.2004.

Ext.P15: True copy of the Order G.O.(Rt)No.1414/2005/Home dated 7.6.2005.

RESPONDENTS' EXHIBITS:

Ext.R3(a): True copy of the considered views of the High Court on the review petition preferred by the petitioner.

K.THANKAPPAN, J.

W.P.(C). NO. 22829 OF 2005

Dated this the 13th day of December, 2006

JUDGMENT

The petitioner has approached this Court challenging Exts.P11, P14 and P15 orders. The petitioner prays that the above orders may be set aside and he may be reinstated in service.

2. While the petitioner was working as Judicial First Class Magistrate, Palakkad, the Chief Judicial Magistrate, Palakkad issued a letter dated 14.6.1993 stating that it has come to the notice of the Chief Judicial Magistrate that there has been tampering and manipulations of the depositions of two witnesses who were examined by the petitioner in C.C.No.73 of 1991 on the file of the Judicial First Class Magistrate's Court III, Palakkad which led to the acquittal of the accused in the above case. It was further alleged in the letter that the above tampering and manipulations were done by the petitioner. Explanation of the petitioner was called for and as per letter dated 18.6.1993, the petitioner gave his explanation. Subsequently, the Chief Judicial Magistrate, Palakkad sent a report to the third respondent on 23.9.1993. The third respondent ordered vigilance enquiry. After the enquiry, a report was submitted to the third

respondent. According to the petitioner, he was not informed about the enquiry. Thereafter, Ext.P1 memo of charges was issued to the petitioner asking him to show cause why disciplinary action under the provisions of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 (hereinafter referred to as "the Rules") should not be taken against him. The petitioner gave Ext.P2 reply to the show cause notice. However, the third respondent issued another official memorandum dated 28.5.1994 appointing the then Additional District Judge, Palakkad as the Enquiry Officer to enquire into the charges. Thereafter, the petitioner was served with Ext.P3 memo of charges alleging that the Chief Judicial Magistrate, Palakkad noticed that in the deposition of PW.2 in C.C.No.225 of 1991, the column for case number, name of the witnesses, date of examination and serial number were left blank. In Ext.P3 also the petitioner was directed to show cause why disciplinary action under the provisions of the Rules should not be taken against him. The petitioner submitted Ext.P4 reply to Ext.P3 show cause notice denying the allegations levelled against him. The third respondent issued another official memorandum on 6.4.1995 appointing the same Enquiry Officer to enquire into the above charges also. The Enquiry Officer so appointed conducted an enquiry simultaneously on both the memo of charges issued to the petitioner. The petitioner also filed Exts.P5 and P6 additional written statements to

Ext.P3 memo of charges. The Enquiry Officer completed the enquiry and submitted Exts.P7 and P8 reports on the same day, that is, on 21.1.1996 to both Exts.P1 and P3 memo of charges. As per Exts.P7 and P8 enquiry reports, the charges levelled against the petitioner were proved. On receiving Exts.P7 and P8 enquiry reports, the third respondent issued Ext.P9 show cause to the petitioner in which it was concluded that the petitioner committed the misconducts alleged against him and the petitioner was directed to show cause why a punishment of dismissal from service should not be imposed on him. The petitioner submitted Ext.P10 reply dated 5.9.1996 stating that the findings entered by the Enquiry Officer cannot be sustained in the absence of any evidence to prove the case against him. However, according to the petitioner, without considering the explanation given by the petitioner and without hearing him in the matter, the third respondent forwarded a report to the Governor of the State recommending a punishment of dismissal of the petitioner from service. Thereafter Ext.P11 order dated 14.8.1997 was issued by the Government ordering removal of the petitioner from service with effect from 12.2.1994, the date of his suspension.

3. On receipt of Ext.P11, the petitioner filed Ext.P12 Review Petition before the Government to review Ext.P11 order and to reinstate

him in service. After considering Ext.P12, the Government issued Ext.P13 letter dated 13.12.2000 to the third respondent holding that the enquiry authority failed to appreciate the evidence on record in the right perspective and violated the principles of natural justice by denying the petitioner the right of personal hearing and set aside Ext.P11 order directing reinstatement of the petitioner in service. On receipt of Ext.P13, the third respondent, without considering the views expressed by the Government, concluded that the petitioner shall be dismissed from service and gave a reply to the Government dated 18.7.2002 informing the stand taken by the third respondent. Thereafter, the petitioner was served with Ext.P14 order, G.O.(MS)No.32/004/Home dated 27.1.2004 rejecting the Review Petition filed by him. On receipt of Ext.P14, the petitioner submitted a representation to the Government requesting to recall the order of dismissal from service and to reinstate him in service. The Government, however, dismissed the representation as per Ext.P15 order, G.O.(MS) No.1414/2005/Home dated 7.6.2005.

4. When the Writ Petition came up for hearing, this Court found that a counter affidavit has been filed for and on behalf of the second respondent and directed the third respondent to file counter affidavit, if any. On the basis of the above direction, the third respondent filed a

counter affidavit on 9.10.2006. This Court heard the learned counsel appearing for the petitioner, the learned Government Pleader and the learned counsel appearing for the third respondent.

5. Learned counsel appearing for the petitioner raised two main grounds: (i) on receipt of Exts.P7 and P8 enquiry reports, the petitioner was served with Ext.P9 show cause notice proposing a punishment of dismissal from service without giving him an opportunity of being heard with regard to the findings entered by the enquiry officer and (ii) the stand taken by the third respondent inspite of Ext.P13 letter issued by the Government is irregular and illegal. With regard to the first contention, learned counsel submitted that the petitioner ought to have been given an opportunity of being heard on the findings entered in Exts.P7 and P8 enquiry reports before issuing Ext.P9 show cause notice regarding the proposed punishment of dismissal from service. To substantiate this contention, learned counsel relied on the decision of a Constitutional Bench of the Apex Court reported in **Managing Director ECIL. v. B. Karunakar (1993) 4 S.C.C. 727**. Counsel further submitted that proposing a punishment of dismissal from service on accepting the findings entered by the Enquiry Officer before considering the explanation given by the petitioner regarding the findings entered against

him and submitting a report to the Government recommending the punishment of dismissal from service is in violation of the principles of natural justice. With regard to the second ground, the learned counsel submitted that as per Ext.P13 letter, the Government had categorically taken the view that the Enquiry Officer had not appreciated the evidence against the petitioner in correct legal perspective and that the petitioner was not given an opportunity of being heard before imposing the punishment of dismissal from service. Inspite of Ext.P13 the adamant view taken by the third respondent, according to counsel, is unjustifiable. Finally, learned counsel submitted that the Enquiry Officer ought to have found that the evidence adduced before him was not sufficient enough to find the petitioner guilty of the charges levelled against him.

6. The learned Government Pleader relying on the counter affidavit filed for and on behalf of the second respondent submitted that the Government had expressed the views in Ext.P13 as the Government was the disciplinary authority of the petitioner and that on the basis of the letter received from the third respondent, the Government had issued Ext.P14 order rejecting the Review Petition filed by the petitioner.

7. Learned counsel appearing for the third respondent submitted

that on the basis of Exts.P7 and P8 enquiry reports, the Enquiry Officer categorically found that the petitioner was guilty of the charges levelled against him and that the misconducts alleged against the petitioner stands proved. Counsel further submitted that it was after considering Exts.P7 and P8 enquiry reports that the third respondent had issued Ext.P9 show cause notice to the petitioner and that the report recommending a punishment of dismissal of the petitioner from service was sent to the Government only after considering Ext.P10 reply given by the petitioner to Ext.P9 show cause notice. According to the learned counsel, Ext.P11 order was passed by the Government on the recommendation made by the third respondent and once a recommendation is made by the disciplinary authority, the Government is bound to follow the same. To substantiate this contention, learned counsel relied on the unreported judgment of this Court dated 1.3.2005 in W.A.No.818 of 2002. Counsel also relied on the decision of the Apex Court reported in **T. Lakshmi Narasimha Chari v. High Court of A.P. (1996)5 S.C.C. 90**.

8. The questions to be decided in this Writ Petition is whether Ext.P11 order passed by the Government is in violation of the fundamental rights of a Government employee as guaranteed under Article 311 of the Constitution of India and whether the recommendation of the third

respondent can be subjected to any review or reconsideration by the Government, being the disciplinary authority of a Subordinate Judicial Officer as per the provisions of the Rules.

9. Under Article 311(2) of the Constitution of India, it is stated that a civil servant is not to be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges levelled against him and given a reasonable opportunity of being heard in respect of those charges. A reading of Article 311 of the Constitution of India would show that the words "reasonable opportunity of being heard" is the mandate of principles of natural justice and this provision has been considered by the Apex Court in a catena of decisions. On this proposition, learned counsel for the petitioner placed reliance on the judgment of the Apex Court reported in **Manging Director ECIL. v. B. Karunakar (1993) 4 S.C.C. 727**. In the above decision, a Constitutional Bench of the Apex Court held in paragraph 27 as follows:

> "It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority

> decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings."

The Apex Court further held in paragraph 61 of the judgment as follows:

> "..... It is settled law that the Evidence Act has no application to the inquiry conducted during the disciplinary proceedings. The evidence adduced is not in strict conformity with the Indian Evidence Act, though the essential principles of fair play envisaged in the Evidence Act are applicable. What was meant by 'evidence' in the proviso to Article 311(2) is the totality of the material collected during the inquiry including the report of the enquiry officer forming part of that material. Therefore, when reliance is sought to be placed by the disciplinary authority, on the report of the enquiry officer for proof of the charge or for imposition of the penalty, then it is incumbent that the copy thereof should be supplied before reaching any conclusion either on proof of the charge or the nature of the penalty to be imposed on the proved charge or on both.

10. A reading of the above paragraphs would indicate that an opportunity of being heard in the case of disciplinary proceedings is a fundamental right available to a civil servant and violation of such a

valuable right vitiates the entire proceedings in which case, the punishment awarded by the disciplinary authority is not sustainable. In the above circumstances, this Court is of the view that on receipt of Exts.P7 and P8 enquiry reports and before proposing a punishment of dismissal from service, the petitioner ought to have been given an opportunity of being heard. Instead of giving such an opportunity, the petitioner was served with Ext.P9 show cause notice proposing a punishment of dismissal from service on accepting the findings entered in Exts.P7 and P8 reports and thereafter, the third respondent forwarded a report to the first respondent recommending a punishment of dismissal of the petitioner from service. Now, it has to be decided whether it was the third respondent or the first respondent who ought to have given an opportunity to the petitioner of being heard before serving him with Ext.P9 proposal or Ext.P11 order. In this context Rule 13 of the rules relating to the jurisdiction of the third respondent to initiate disciplinary proceedings against a Subordinate Judicial Officer has to be looked into. Rule 13 of the Rules reads as follows:

> "**Disciplinary authorities.-** (1) The Government may impose any of the penalties specified in items (i) and (iii) to (viii) of rule 11 (1) on members of the State Services:
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> Provided that the authority competent to

> impose the penalties specified in items (i), (iii), (iv), (v), (vii) and (viii) of sub-rule (1) of Rule 11 on the members of the Kerala Civil Judicial Service other than Munsiffs or the members of the Kerala Criminal Judicial Service other than Judicial Magistrates of the Second Class, shall be the High Court:
>
> Provided further that the authority competent to impose the penalties specified in items (vi), (vii) and (viii) of sub-rule (1) of Rule 11 on District Judges or Munsiffs or Judicial Magistrates of the Second Class shall be the Governor:
>
> Provided also that the Governor shall exercise the power conferred by the foregoing proviso after obtaining a report by the High Court."

11. From a reading of the above provision, it is clear that on receipt of the report from the High Court as provided under the third proviso to Rule 13 of the Rules, the Government or the Governor of the State is the disciplinary authority to impose the punishments mentioned in Rule 11 of the Rules on District Judges, Munsiffs or Judicial Magistrates. It has to be borne in mind that though as per the provisions of the Rules, the appointing authority of a Judicial First Class Magistrate or a Munsiff is the High Court, the punishment mentioned in Rule 11 can be imposed by the Government. In this context, the Apex Court, in the decision reported in **T.Lakshmi Narasimha Chari v. High Court of A.P. (1996) 5 S.C.C. 90** held that once the High Court has entered a finding against a Judicial

Officer and recommended the Government or the Governor to award the required punishment, the Government or the Governor has to accept the same and there is no option left to the Government or Governor to deviate from the recommendation made by the High Court. But, as per the Andhra Pradesh Civil Services(CCA) Rules, 1963, there is a specific provision for appeal before the Government against the findings entered by the High Court against a Judicial Officer or against a punishment proposed by the High Court. There is no such provision in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960. However, the first respondent - Government or the Governor has got jurisdiction to review the order passed by them. But, this review power cannot be equated with the appellate power of the Government available under Section 21 of the Andhra Pradesh Civil Services (CCA) Rules, 1963. In this regard it has to be remembered that in the unreported judgment of this Court in W.A.No.818 of 2002, the Division Bench had taken the view, in the light of the decision in **T. Lakshmi Narasimha Chari v. High Court of A.P. (1996)5 S.C.C. 90,** that the State has no jurisdiction to deviate from the recommendation made by the High Court. But the Bench had not considered the impact of the difference of the two Rules.

12. Admittedly, Ext.P11 order was passed by the first respondent –

Government only on the basis of the recommendation or report of the third respondent recommending a punishment of dismissal of the petitioner from service. Ext.P11 was issued by the Government not exercising its appellate or review or revisional power , but as the authority competent to impose such punishment. That apart, it is not discernible from Ext.P11 order that the petitioner was given an opportunity of being heard before the recommendation or report of the third respondent or prior to the issuance of Ext.P11. In the above circumstances, it is reasonable to hold that the first respondent ought to have given the petitioner an opportunity of being heard in the light of the decision of the Apex Court reported in **Managing Director ECIL. v. B.Karunakar (1993) 4 S.C.C. 727**. Ext.P9 show cause notice proposing the punishment cannot be considered as an opportunity given to the petitioner of being heard as per the dictum laid down by the Apex Court.

13. The next point to be considered is regarding the sustainability of the Review Petition filed against Ext.P11 order. The petitioner had filed Ext.P12 Review Petition and the Government after considering Ext.P12, issued Ext.P13 to the third respondent whereby Ext.P11 order was set aside and a direction was given to reinstate the petitioner in service. It has to be noted that the stand taken by the Government in

Ext.P13 has been reiterated in the counter affidavit filed for and on behalf of the first respondent – Government. However, the third respondent did not accept the views expressed by the Government taking the stand that the petitioner had been given an opportunity of being heard. Further, the third respondent informed the Government that the views of the Government were considered by the Administrative Committee and the Full Court. But, it is not stated that the petitioner was given an opportunity of being heard prior to the issuance of Ext.P9. Subsequently, as per Ext.P14 order, the Government rejected the Review Petition filed by the petitioner. Even after Ext.P14, the petitioner filed a representation before the Government to recall the order of removal, but that representation was also rejected by the Government as per Ext.P15 order. As this Court has already found that the first respondent – Government issued Ext.P11 order as the authority competent to impose the punishment on the petitioner, the Government is fully justified in entertaining the Review Petition filed by the petitioner.

14. Hence, in the light of the finding entered by this Court that the first respondent – Government ought to have given the petitioner an opportunity of being heard before issuing Ext.P11 order, this Court is of the view that Ext.P11 order is not sustainable in law and it is in violation

of the fundamental rights of the petitioner guaranteed under Article 311 of the Constitution of India. In the light of the above finding, the subsequent orders, Exts.P14 and P15, passed by the Government are also not sustainable.

15. Accordingly, Exts.P11, P14 and P15 orders issued by the Government are hereby quashed. The first respondent – Government shall consider the issue afresh in accordance with law, after affording the petitioner an opportunity of being heard, bearing in mind the dictum laid down by the Apex Court in the decision reported in **Managing Director ECIL. v. B. Karunakar (1993) 4 S.C.C. 727**. With regard to the contention of the learned counsel appearing for the petitioner that the findings entered by the Enquiry Officer are not based on any evidence, this Court does not propose to enter a finding on this aspect as the Government is directed to consider the matter afresh. However, final decision in the matter shall be taken as expeditiously as possible, at any rate within 30 days from the date of receipt of a copy of this judgment.

The Writ Petition is disposed of as above.

(K.THANKAPPAN, JUDGE)

sp/